



**Chege v Naku Dwellers Ltd & another (Environment & Land Case
296 of 2014) [2023] KEELC 16531 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16531 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 296 OF 2014
FM NJOROGE, J
MARCH 23, 2023**

BETWEEN

ZACHARIAH MBURU CHEGE PLAINTIFF

AND

NAKU DWELLERS LTD 1ST DEFENDANT

**GILBERT KABAGE T/A PATA COMMERCIAL ENTERPRISES 2ND
DEFENDANT**

JUDGMENT

1. The plaintiff filed an amended plaint dated April 1, 2015 seeking judgment against the defendants jointly and/or severally for the sum of Kenya shillings 25,960,000 plus costs and interest.
2. The plaintiff's case is that at all material times the 1st defendant was the registered proprietor of the property known as Nakuru Municipality Block 7 /7 while the 2nd defendant acted as its duly authorized agent in the matter of the sale of the suit land. On the basis of that principal agent relationship the 2nd defendant procured the plaintiff to enter into an agreement for sale of the parcels known as no 6, 13 and 14 being proposed subdivisions of the main parcel referred to as Nakuru Municipality Block 7 /7 at an aggregate consideration of Kshs 2,600,000/=; it is stated that the 2nd defendant expressly and /or impliedly warranted that he was authorized by the 1st defendant to make the said contract with the plaintiff. According to a fundamental term of the agreement, the plaintiff was to deposit an initial sum of the sum of Kshs 1,000,000/= for the purchase of the suit plots and the balance of the purchase price in the sum of Kshs 1,600,000/= was to be paid once the subdivision of the subject land was approved upon which the plaintiff was to take possession of the plots. The subdivision of the main parcel was approved and the Registry Index Map (RIM) was subsequently amended and the proposed subdivisions were issued new numbers on the said RIM. Plot no. 6 became plot no Nakuru Municipality Block 7 /676; Plot no 13 became plot no Nakuru Municipality Block 7 / 681 and Plot no 14 became plot no Nakuru Municipality Block 7 /680. The parties entered into a further oral



contract on or about May 2005 by which the plaintiff was allowed to take possession of the suit land and undertake developments thereon.

3. However, in breach of the agreement between the parties, the 1st defendant wrongfully failed to take any steps to complete the said sale and attempted to repudiate the authority of the 2nd defendant to enter into the agreement. The plaintiff states that he has been ready at all times to complete his obligations under the contract; however, the 1st defendant sought and obtained the cancellation of the subdivision and the amalgamation thereof back into the original parcel Number Block 7/7 in total disregard and breach of the agreement. After the amalgamation the 1st defendant sold the entire parcel to a third party.
4. The plaintiff further pleads that if the 2nd defendant did not have any authority to sell then he, the 2nd defendant is in breach of his warranty of authority as the plaintiff cannot enforce the contract against the 1st defendant, and he has consequently suffered loss and damage. The particulars of breach on the part of both defendants are set out in the plaint. Further the plaintiff avers that he has suffered the loss totalling to Kshs 25,960,000/=
 - i. Deposit paid: Kshs 1,000,000/=;
 - ii. Liquidated damages of 10% of the purchase price 260,000/=;
 - iii. Costs incurred by the plaintiff in performance of obligations Kshs 300,000/=;
 - iv. Loss of bargain in respect of the suit property Kshs 24,400,000/=.
5. Despite demand the defendants have failed to complete the agreement. The plaintiff therefore seeks in his amended plaint judgment against the defendants jointly and /or severally for the sum of Kshs 25,960,000/= plus costs and interest.

Defence of the 1st defendant

6. The 1st defendant filed its defence on April 14, 2015; it denied being the registered owner of plot Number Block 7/7 or that the 2nd defendant was ever its authorized agent at all; it denied knowledge of the transaction entered into between the plaintiff and the 2nd defendant over plot no Block 7/7; it denied having ever received the sum of Kshs 1,000,000/= made by the plaintiff to the 2nd defendant and stated that as a result of that there arose no binding contract between it and the plaintiff, and that the sum paid should be sought from the 2nd defendant. The 1st defendant further states that mother parcel once reconstituted by amalgamation was sold with the knowledge of the plaintiff to a third party and without demur and indeed with active participation on the plaintiff's part; that the 1st defendant had no obligation to seek approval of the plaintiff to sell the land and was in no breach of any agreement; that there was no privity of contract and the plaintiff deserves no compensation. The 1st defendant alleges that the plaintiff's claim is barred by the provisions of section 4(1) (A) of cap 22 of the Laws of Kenya. It was further alleged by the 1st defendant that no demand has been made and the suit is premature. Another technicality raised was that the plaint is not in compliance with Order 3 Rule 2 of the [Civil Procedure Rules](#).

The 2nd defendant's defence

7. The 2nd defendant's defence was filed on April 30, 2015. He states in that defence that he was the 1st defendant's agent having authority to enter into the contract between him and the plaintiff or any other third party in respect of the suit land and that he is not in breach of his warranty to the plaintiff, or in breach of the contract as pleaded in the plaint. He therefore stated that being the agent of a disclosed



principal he was therefore not liable to the plaintiff in the circumstances. He prayed that the suit against him be struck out with costs.

Evidence of the parties

8. Zakaria Mburu Chege, the plaintiff, testified as PW1. He stated that he is a resident of Nairobi and had earlier been living in Nakuru and was a transporter by profession. He adopted his witness statement signed on October 9, 2014 as part of his evidence and testified that the sale agreement they entered into was dated March 17, 2005 which he produced as PExh.1(a). He stated that he paid Kshs.1,000,000/= as a deposit and was issued with 2 receipts one dated March 5, 2005 for Kshs.200,000/= and another one dated March 29, 2005; The receipts were produced as PExh.2(a) and 2(b) respectively. It was his evidence that he took stones to the plot and when he wanted to commence construction, he was told to await change of user. He testified that his office was across the road where he could see the plots from his office. The balance of 1,600,000/= was to be paid after subdivision and change of user from Residential to Commercial. He averred that the change of user was never done. He testified that after some time, they were told that the whole main parcel had been sold to a third party, Egerton; that he therefore kept on asking Kabage, the seller when they would complete the transaction and they were told to wait; that he gave a notice to complete dated November 9, 2014 to the 1st and 2nd defendants which he produced as PExh.6. Despite the notice, no step was taken to complete; that they then found out that there were other cases which were on going. He also testified that he had been away at work in Turkana and had not known about the said cases. He stated that he had known that there were other purchasers but he did not know their identity; that after finding out about the cases, he decided to file the present case; that he blamed Naku Dwellers and Gilbert Kabage for the breach of the contract because Kabage must have known of the other sale that was going on. He reiterated that the proposed change of user was not done after the payment was made; that he did a valuation on October 16, 2014 of the 3 plots through Clonea Real Estate which valuation report was marked as PMFI-9, that the value of the properties was Kshs. 27,500,000/=. He sought to be paid for the plots as per the current value and an award of damages which the court may assess; that the agreement provided for payment of damages for breach which was 10% and was therefore Kshs. 260,000/=. He also prayed for costs of the case.
9. Upon cross-examination by Mr. Karanja, PW1 stated that his agreement was not a temporary sale agreement with Mr. Kabage on behalf of Naku Dwellers Ltd but also confirmed that PExh.1 was headed “temporary sale agreement” and did not mention the 1st defendant. He admitted that he did not have any documents showing the involvement of Naku Dwellers Ltd. He further admitted that he did not have any documents connecting the 1st and 2nd defendants. He confirmed that he paid Kshs. 1,000,000/= to the 2nd defendant and was to take possession when the subdivision was done and payment made; that after the agreement he went to take possession but was told to wait. He confirmed that later subdivision was done and he was given a copy of the subdivision scheme. He admitted that he did not know if the subdivision was later reversed. He stated that he came to learn that there was a change of ownership afterwards from the buyers who had sued. He confirmed that he did not pay Mr. Kabage the balance of the purchase price of Kshs. 1,600,000/=. He admitted that he had taken some stones to the suit properties because he had waited for too long to be allowed to take possession. He also confirmed that Mr Kabage verbally told him to wait whenever he visited his office. He stated that he was always ready to pay the complete purchase price but he never paid it. He admitted that there was a letter requesting him to pay the balance but it was not from Kabage. He stated that he did not breach the agreement and that at the time he was giving his evidence, there was a house on the land. He reiterated that he needed compensation and admitted that he did not conduct the valuation of the plots as at the time he was going to purchase them because for 2 – 3 years he was in Turkana; that



he came back in the year 2014 and heard there was a change of ownership. He admitted that he did not have evidence that the property appreciated and that he always followed up with Mr. Kabage. He stated that Kabage had not notified him that he was not entitled to the properties due to non-payment and further confirmed that at the time the valuation was being done, is when the developments on the plots were commencing; that he did not ever ask for a refund and that he does not have any contractual relations with the 1st defendant. He stated that he conducted a search in the year 2005 to know the owners which search he lost when he was on transfer from Nakuru.

10. Upon cross-examination by Mr. Ngure PW1 reiterates that he did a search before purchasing the property but it got lost; that he had satisfied himself that Kabage had authority of the Naku Dwellers Ltd to sell the property; that he was shown a letter authorizing Kabage to sell the land; that there was no complaint that the deposit of Kshs. 1,000,000/= never reached Naku Dwellers and that balance of the purchase price was Kshs. 1,600,000/=; that they knew that they would pay 1.6 million and the process was to take 6 months but he did not have the cash; that there were damages for breach provided for that he was aware of and that there was no provision of a refund. He stated that the agreement made reference to interest. When he was shown paragraph 4 of PExh.1, he confirmed that he does not know who between the 1st and 2nd defendant sold the land to a third party and that at the time he was purchasing the property, he knew the property he was buying belonged to Naku Dwellers Ltd.
11. Upon re-examination by Mr. Ikuu PW1 stated that Paragraph 3 of PExh.1 indicated that approval was expected to take less than 3 months. He further stated that there was no clause that time was of essence; that the refund of Kshs. 1,000,000/= was to be without interest which refund was never offered by any of the defendants; that later the property was offered for sale as one unit which he came to learn of around September 2014 from the seller, Pata Commercial Agencies who gave him a copy of a letter (2DMFI-4). That it was after that that he decided to sue, that he was never called to be asked if he was unable to pay and that he was still engaging with the 2nd defendant over the sale even after a period of six months had lapsed.
12. Pius Isaiah Khaoya testified as PW2. It was his evidence that he was a property Valuer by profession; that he conducted a valuation in respect of the suit property under the plaintiff's instructions in October 2014 for plot Numbers Nakuru Municipality Block 7/680, 681 and 682; that they were the proposed subdivisions of Plot No. 7, that he prepared a valuation report dated October 16, 2012 which he produced as PExh.9; that there were 3 proposed titles; Plot 680 was valued for Kshs. 9,500,000/=; Plot No.681 was valued for 9,500,000/= while Plot 682 was valued for Kshs. 8,500,000/= and the total came to Kshs. 27,500,000/=; that he signed the report in the year 2014, that when he was summoned to come to court and give evidence, he went to the suit properties. He stated that Plots No. 680 and 681 had old developments at the time of valuation. The 3 properties have now been developed with an ultra-modern mall. He further stated that minus the developments thereon now, plot 682 would sell for Kshs.15 – 16 million, that the other plot No's 680 and 681 would also sell for 14.5 million – 15 million for each plot now; that the total would be a maximum 45 million for all the 3 plots.
13. Upon cross-examination by Mr. Karanja PW2 states as follows: that he is the sole proprietor of the Valuation Business; but said that he did not have the certificate of registration in court; he confirmed that Zachariah Mburu Chege had instructed him to conduct the valuation; that he only gave him a copy of the lease certificate and stated that he had bought the property. He also confirmed that he was in the company of an agent during the valuation exercise and that it was the agent who sold the suit properties; that he can not recall the name of the agent and that Mr. Zachariah was not present at that time. He confirmed that he had a subdivision plan which was registered by then. When he was shown the certificate of lease for Block 7/7, he stated that the sketch map was an extract of the Registry Index map. He further confirmed that Block 7 was an authentic Block at the Survey of Kenya; that the extract



was not certified to be from the RIM. He reiterated that he was instructed in respect of 3 plots in the year 2014; that he was given the numbers of the properties and the map extract, that Plots Nos. 6, 13 and 14 had been transferred to 682, 681 and 680 respectively on the RIM; that Zachariah never told him that he had instructed him about plot no's 682, 681 and 680; that the land had been subdivided but not registered. When he was shown page 5 of Valuation Report, "General Remarks" (item ii), he confirmed that the change of use and subdivision were ongoing, that he did not do the survey and that he cannot have given the valuation as at the year 2005 but if given time, he could establish that value.

14. Upon cross-examination by Mr. Nguire, he confirmed that the property was a leasehold of 59 years from year 2000. He also stated that the balance of the lease period as reflected at page 3 of his report was 85 years. However, he further stated that the correct balance of lease term was 37 years given the proper term in the lease and that if he had used the proper balance, it would not have affected the value; only the very low balance of lease terms matter, e.g. 7 years; that the period was enough to conduct a development on the suit land and obtain an extension; that a renewal of lease should be automatic if one paid rent and rates etc. He confirmed that he was not aware of any issues that would lead to rejection of application for extension of the lease and that the potential of extension of lease matters.
15. He reiterated that the difference of 37 and 85 years does not change the value of the suit properties and he could use 37 years and get the same value; that the difference in the years was a typographical error. He admitted that the two parcels had an old structure but he did not find out if they were occupied as he was strictly doing the valuation; that the nominal value of the development was included and that he could not access the inside of the premises; that the value of the developments does not affect the overall valuation. He also confirmed that Plot No's 680, 681 and 682 were not official by then; that the scheme was from 673 – 686 while his valuation was in the year 2014. He admitted that he went back to the site the day before he gave his evidence and the estimate of the current value is based on what is going on in block 7 now and that it has old houses. He confirmed that he visited the suit properties to know the state of development on the land but he did not have notes of the said visit. Upon re-examination by Mr. Ikua, he admitted that he practices in Nakuru and he is conversant with property prices.
16. The plaintiff's case was then marked as closed at that point.
17. On the November 18, 2022 1st and 2nd defendants' respective cases were marked as closed without calling any evidence.

Submissions

18. The 1st defendant opted not to file any submissions. The plaintiff filed his submissions on February 1, 2023 while the 2nd defendant filed his on February 21, 2023. I have considered the said submissions.

Analysis and determination

19. The defendants never called any evidence in support of their respective defences. However, it was held in *Serraco Limited v Attorney General* [2016] eKLR that failure to call evidence by the defendant does not necessarily lead to an automatic judgment against him.
20. In this case however, I note that the defence of the 2nd defendant was that he had been duly authorized by the 1st defendant to dispose of the suit property. The 2nd defendant also having adduced no evidence, this court is of the view that the greater burden of proof was on his alleged principal. It was on the 1st defendant's shoulders prove that he had given no such authority but the latter never adduced any evidence.



21. I am therefore persuaded that the 2nd defendant had valid authority from the 1st defendant to dispose of the suit property which he did to the plaintiff and the 1st defendant is therefore liable for the acts of the 2nd defendant who was his agent in the matter.
22. The plaintiff's evidence went uncontroverted and I am of the view that he has established his claim against the 1st and the 2nd defendant on a balance of probabilities and he therefore deserves judgment against them.
23. Regarding the claim for loss of bargain, the plaintiff demonstrated a willingness to complete the contract between him and the defendants. He issued a notice to complete dated September 9, 2014 while the agreement had been executed on March 17, 2005. That is a difference of 9 years.
24. I find persuasive the decisions in *Consoline Atieno Ononia v Samuel Mulera Lukiri* [2021] eKLR and *Philip Wanjohi Kariuki v Kennedy Njenga Nyambura & 2 others; Lazarus Sankori Karino (Interested Party)* [2020] eKLR where the courts adopted the position that "...where it is the vendor who wrongfully refuses to complete, the measure of damage is similar to the loss incurred by the purchaser as the natural and direct result of the repudiation of the contract by the vendor. These damages include the return of any deposit paid by the purchaser with interest, together with expenses which he has incurred in investigating title, and other expenses within the contemplation of the parties, and also, where there is evidence that the value of the property at the date of repudiation was greater than the agreed purchase price, damages for loss of bargain....."
25. In view of the above case law I am of the view that the plaintiff is entitled to damages for loss of bargain. In totality, I must therefore consider the following in this judgment:
 1. The return of any deposit paid by the purchaser with interest;
 2. The expenses which the plaintiff incurred in investigating title and preparing to develop the property;
 3. The penalty in the agreement which was within the contemplation of the parties; and
 4. damages for loss of bargain which will be determined by whether the increased value of the property at the date of repudiation was greater than the agreed purchase price.
26. September 9, 2014, being the date on which the plaintiff issued a completion notice, must be deemed to be when he realized that the defendants were in the process of breaching the agreement. The suit property must have considerably appreciated by the time of the completion notice, and the valuation report issued on October 16, 2014 places the value of the three plots at Kshs 27,500,000/= and the sum is claimed under the head "loss of bargain" is Kshs 24, 400,000/=; in this court's view the plaintiff's claim of loss of bargain is merited. The sum claimed for loss of bargain is derived from the only expert report that there is in the record, that of the valuer. Nevertheless, it is noteworthy that the market value given by the valuer includes the developments on plots numbers 680 and 681 (houses and a wall) which the plaintiff does not claim to have erected. The valuer attempted to give another opinion in oral evidence but I must abide by the written report. I must therefore give allowance for the value of these developments and in this court's view, they may have cost about Kshs 5,000,000/= which must be deducted from the Kshs 27,500,000/= valuation in computing loss of bargain.
27. Accordingly, the plaintiff is entitled to the refund of the deposit of consideration paid as well as 10% penalty as per Clause 5 of the agreement. He is also entitled to loss of bargain. However, the plaintiff had only paid Kshs 1,000,000/= to the defendants. If he had paid the entire consideration this court would certainly have considered him eligible for a higher award under loss of bargain. As only



38.46% (Kshs 1,000,000/=) of the purchase price went to the defendants and has never been refunded, only that percentage (38.46%) out of the discounted value of the property Kshs 22,500,000/= (being Kshs 27,500,000/= less Kshs 5000,000/= (for developments thereon)) which gives the sum of Kshs 8,653,500/= can be awarded to the plaintiff as loss of bargain. Having all the circumstances of the present dispute in mind this court therefore assesses the plaintiff's loss of bargain at Kshs 8,653,500/=.

28. In the end I therefore enter judgment against the 1st and 2nd defendants jointly and severally and I issue the following orders:
- i. The 1st and 2nd defendants shall pay to the plaintiff the sum of Kshs 1,000, 000/= being refund paid as deposit to the 2nd defendant;
 - ii. The 1st and 2nd defendant shall pay to the plaintiff the sum of Kshs 260,000/= being the prescribed penalty in the contract for termination of the contract without good reason;
 - iii. The 1st and 2nd defendants shall pay to the plaintiff the sum of Kshs 8,653,500/= being damages for loss of bargain;
 - iv. No costs incurred by the plaintiff in performance of obligations under the contract were proved and a claim under that heading is declined;
 - v. As loss of bargain has been awarded, the damages for loss of bargain in (iii) above shall only bear interest at court rates from the date of this judgment till date of payment in full;
 - vi. The 1st and 2nd defendants shall pay to the plaintiff the costs of the present suit.

It is so ordered.

Dated, signed and delivered at Nakuru via electronic mail on this 23rd day of March, 2023.



MWANGI NJOROGE
JUDGE, ELC, NAKURU

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